UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12796-reg

- -x

In the Matter of:

FLETCHER INTERNATIONAL, LTD.,

Debtor.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

October 2, 2013

10:01 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

Doc# 277 Motion for Protective Order - Discovery Dispute

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P R O C E E D I N G S

THE COURT: Let me get appearances, and then I have a couple of preliminary comments.

MR. TREMONTE: Good morning, Your Honor. Michael Tremonte and -- that's T-R-E-M-O-N-T-E and Mark Cuccaro C-U-C-C-A-R-O, Sher Tremonte for Fletcher Asset Management.

THE COURT: Okay.

MR. JACOBSON: Your Honor, Neal Jacobson on behalf of the Securities and Exchange Commission.

THE COURT: And the SEC, unlike the U.S. Trustee program, still has the ability to work today?

MR. JACOBSON: We're told that we probably have a few weeks.

THE COURT: Okay.

MR. JACOBSON: Thank you.

MR. HORNUNG: Good morning, Your Honor. Stephan Hornung, from Luskin, Stern & Eisler, on behalf of the Chapter 11 Trustee,

THE COURT: Right, thank you, Mr. Hornung.

All right. Gentlemen, I've read the papers, and I don't want you to repeat them. I do want to hear from you, Mr. Tremonte, as to whether it's disputed, as I gather from the SEC's papers, that your client designated every single one of the documents that it had produced to the Fletcher International trustee, as confidential. And -- I guess this is

a compound question; after you've answered the first, answer the second -- whether it's your position that your doing that immunizes all of those documents from production by the Fletcher International trustee, in contrast to what I would have read that stip that I so ordered to be, to be simply giving you an initial level of protection after which you have to show why any such designation would be binding on a court like me.

I also need you to focus on your remarks on the extent of what I'll call and what the case law calls justifiable reliance for the belief that by handing those documents over to the Chapter 11 trustee, you could have expected that they would be protected from disclosure. Mr. Tremonte, I'll hear from you first.

MR. TREMONTE: Yes, Your Honor.

THE COURT: Main lectern, if you will, please.

MR. TREMONTE: Thank you, Your Honor. Let me address each of the Court's inquiries in turn.

With respect to the confidentiality designation of the documents at issue, the answer is simply yes. There is an agreement in place between FAM -- Fletcher Asset Management, which I'll refer to as FAM -- and counsel for the trustee, that for the purposes of the conduct of discovery to date, all of the documents that were -- that made their way into the possession of the trustee from what we refer to as the e-mail

server, satisfy, in fact, the definition of confidential information which is memorialized in the protective order.

Now, that agreement was not taken willy-nilly without some reflection and some thoughtfulness on the part of either FAM or the trustee. And I would direct the Court to --

THE COURT: What's FAM -- I don't know if you were in the courtroom on any of the many times I've said that I can't live with acronyms.

MR. TREMONTE: I'm sorry, Your Honor. I was not. I was not aware of that. Fletcher Asset Management, and I will refer to it as such going forward.

The confidential information definition in Section 1 of the protective order is quite broad, and it includes, without limitation, "information" -- and I'm reading from a protective order -- "concerning the disclosing parties' assets, liabilities, business operations, business practices, business plans, financial projections, financial and business analysis, corporate governance, et cetera."

We've spent a great deal of time examining each document individually in the course of our review. I know that the lawyers for the trustee have also spent a tremendous amount of time with these documents. And so to the extent that we have arrived in agreement that those documents from the e-mail server should be designated confidential, it is a considered decision. They all, in fact, satisfy the definition. These

are not e-mails about family or sports or about redecorating the office. These are all highly detailed conversations between principals of Fletcher Asset Management, of the debtor, Fletcher International Limited Bermuda, and other affiliates of the debtor.

And so this is not a situation which you do find in some of -- in some of the cases. And I want to be very, very careful here. There are really two categories of Martindell cases. There are cases where a third party who's a private entity or a private person is seeking disclosure, and there are cases where the government is seeking disclosure. And this is not like any of the cases cited in the government's brief, the majority of which involve private parties, where there was a willy-nilly designation; or a stipulation that embodied a broad agreement to provisionally keep everything confidential; or to allow the parties to unilaterally designate. None of those things happened here, and the designation was a considered decision and it's accurate, in our view.

THE COURT: I lost you when you said it didn't involve a situation where a party could unilaterally designate. I was under the impression that your client did designate and unilaterally did so, all of the production to the trustee as confidential.

MR. TREMONTE: And, Your Honor, I don't want to split hairs. I don't think it makes sense. It is the case, the fact

is, that the designation of all the e-mails as confidential, is pursuant to an agreement initiated by Fletcher Asset Management, my client, but agreed to by the trustee. And again, for good reason, because these documents do satisfy the definition.

In terms of the Court's question about whether or not that designation immunizes the documents, and I think it's related, under the circumstances, to the Court's question about justifiable reliance; and if the Court would allow me just a few minutes to walk through the analysis as to why, the answer to both of those questions is emphatically yes.

The chronology here is very important. In fact, all the facts are terribly important on this motion. The chronology is as follows. We got a notification from the trustee on July 11 of this year that they had received a subpoena from the SEC, that in fact, they had received it about a month earlier, on June 19.

After we learned about the subpoena, we spoke to the SEC staff in Washington. We immediately reached out to the government. We discussed the terms of the protective order, and we advised the government clearly of our view -- both of the history of the discussions and arrangements, agreements, between Fletcher Asset Management on the one hand and trustee's counsel on the other. But most importantly, two things: one, we advised them of our view as to Martindell, but we also

invited the SEC, at that time, to subpoena Fletcher Asset Management directly.

After about another month, no response from the SEC. Another month went by. On August 6th, the SEC notified the trustee that they were willing to litigate to get at the documents. And now, nearly four months after the SEC's original subpoena had been issued, we're here, as specifically contemplated in the order, trying to understand why the SEC won't simply serve a subpoena on FAM directly.

And I emphasize the timeline to make what I think is a very, very important point under the case law. Had the SEC subpoenaed Fletcher Asset Management directly four months ago, we would have spent the past 120 days reviewing and producing documents, and the SEC would actually be much closer to completing its inquiry.

And the Court should know also that the SEC has extensive prior experience with Fletcher Asset Management, and it has all been positive. And based on that prior experience, the SEC has every reason to be very confident of FAM's cooperation and good faith in responding to document requests.

The inquiry that brings us here, the SEC inquiry involving Fletcher Asset Management, began in 2009, Your Honor. The SEC notified Fletcher Asset Management in July of that year that it had begun an inquiry, and it subsequently issued five subpoenas directly to my client, at least five. I wasn't

involved. During that time, Skadden Arps represented Fletcher Asset Management. But there were at least five separate subpoenas and many, many informal documents requests from the SEC to Fletcher Asset Management.

In response to those prior subpoenas and document requests, between 2009 and 2011, Fletcher Asset Management produced over two million pages of documents directly to the SEC. FAM was, in every respect, cooperative, and made complete, organized, and prompt productions to the SEC. And after all those subpoenas and requests and following the Commission's review of literally millions of documents, there was a Wells Process. And at the end of that Wells Process there was a conclusion by the SEC, without any finding of wrongdoing by FAM or any of its affiliates.

That's the same investigation that the SEC is undertaking now. I have a representation from the staff in Washington that we're proceeding under the same formal order. And as the subpoena shows, it's the exact same investigation number.

So again, we scratch our head and wonder why, despite our invitation for a subpoena directly to FAM, we're not getting one.

THE COURT: Pause. I should have interrupted you sooner. A Wells submission informs a person or entity of the potential for being the target of further enforcement action?

MR. TREMONTE: Yes. And as I said, after the Wells Process had run its course, it concluded without a finding of wrongdoing by Fletcher Asset Management or its affiliates. That's a representation that was made by the SEC to counsel at that time, Skadden Arps. And that was the conclusion of that process.

Now, it's not clear to me -- the SEC will not tell me what's going on -- what's different, what has changed. But they have reopened the investigation in the past, as far as we know, in the past -- at least in the past four months. And this time around, despite the fact that we've been extremely good about producing documents every time they ask, whether by subpoena or otherwise, this time they want them from the trustee.

It doesn't make sense to ask for these documents from the trustee. It doesn't make sense when Fletcher Asset Management is obviously in the best position to determine what materials are responsive to the requests and to ensure that the SEC has a complete set of those documents. It doesn't make sense when FAM should have the opportunity to object to the subpoena, to the SEC's requests as appropriate, and if necessary, to negotiate and litigate with the SEC concerning the terms of its enforcement.

It really doesn't make sense to deprive Fletcher Asset Management of the opportunity to ensure against the production

of privileged documents. And here, I'm thoroughly mystified by the averments in both the submissions here by trustee's counsel and by counsel for the SEC, which indicate that a clawback provision has been negotiated between, on the one hand, the trustee, and on the other hand, the Securities and Exchange Commission; and somehow this is supposed to give the Court and the parties comfort that Fletcher Asset Management's privilege will be protected.

Now, for the life of me, I don't understand how that would work. And I don't understand how it makes sense, logical or legal, for the responsibility for policing Fletcher Asset Management's privilege to rest with the trustee going forward.

And now, again, coming back specifically to the Court's questions about immunity and justifiable reliance. The SEC's reading of the protective order really does render it a nullity. The protective order, according to the SEC, affords no meaningful protection to Fletcher Asset Management from disclosure to the outside parties, including the government. And in fact, if you follow the SEC's position, the Court's protective order only prohibits disclosure to outside parties who have not subpoenaed the trustee. That is the logical consequence of the SEC's position. If the SEC is right, then anyone with a subpoena can get at FAM's documents.

Now, the SEC's main argument for avoiding the holding of Martindell is to argue that it simply doesn't apply, that

there in fact, is no protective order in place. Specifically, the Commission interprets the design of the protective order as proof that disclosures in response to a subpoena are not prohibited in the first instance, and that a further order of this Court is required to prevent disclosure to outside parties.

Now, in our view, that really doesn't make sense. Mechanisms like the one that's embodied in this protective order are required, because without them, there would be no way for the trustee to avoid being in contempt of court every time it receives a subpoena from an outside party. In other words, the protective order would not work without a provision directing the producing party -- here the trustee -- to go to court to enforce it against an outside party, because the trustee would be forced, necessarily, into an untenable position.

On the one hand, he could produce materials to the outside party, but that would be in violation of the protective order which specifically prohibits that in many -- in multiple places. On the other hand, the trustee could refuse to comply with the subpoena, but that would leave the trustee in contempt of the issuing court, the court that issued the subpoena in the first place.

So the provision that we have here, which enables the court to adjudicate conflicts between the protective order and

subpoenas from outside parties, is the absolutely reasonably and widely used method for addressing this dilemma. And the fact that the protective order has this provision is not evidence, as the SEC suggests, that it's not really a protective order, that we're not, in fact, entitled to the protections that are expressly described in the text of the document.

The SEC, in our view, has a very strong interest in convincing the Court that the protective order is not really a protective order, because it wants to avoid Martindell. And that's because from the SEC's perspective, on the facts of this case, the Martindell standard is absolutely insurmountable. There is no way, it is impossible for the Securities and Exchange Commission in this case to show compelling need for disclosure of these documents, because it is beyond dispute that the Securities and Exchange Commission can subpoena FAM directly, as they have done many times in the past in this very investigation.

The SEC has a backup position --

THE COURT: Pause, please, Mr. --

MR. TREMONTE: Sure.

THE COURT: -- Tremonte.

MR. TREMONTE: Yes, Your Honor.

THE COURT: Because the substance of this aspect of your argument is that the SEC can get the documents anyway.

That walks, talks, and quacks like no-harm no-foul to your client. But it also invokes part of the analysis by Judge Ellis -- Ron Ellis -- in the International Equity Investments decision, where he says that "where the parties have not given up any rights", such as a Fifth Amendment right -- I'm adding that parenthetically, and I'm continuing my quote -- "and indeed would have been compelled to produce the discovery materials even in the absence of a protective order, the presumption against modification is not as strong." And he quotes EPDM. Isn't that exactly what I've got here?

MR. TREMONTE: That is a question which if the Court rules in favor of the SEC, will never be answered. It is an open question which is not before this Court whether or not the subpoena that the SEC issued for these documents, if issued to FAM -- I'm sorry -- to Fletcher Asset Management, would be enforceable on its terms. And that is precisely the reason why there would be significant harm to Fletcher Asset Management if the protective order were lifted and these documents were produced. We would never get to litigate the question, precisely the question that Your Honor references, as to whether or not Fletcher Asset Management would, in any event, be required to produce these documents.

And the SEC can get up here and say all it wants that that would be the case, but that's not a question before this Court, that's a question for the enforcing court, if, in fact,

a subpoena was directed to Fletcher Asset Management. And another point there, Your Honor, I'm put in mind of the Electrolux case that was decided by Judge Bianco in 2012 in the Eastern District, also a case involving a third party that was as private litigant, okay, that sought disclosure of discovery documents covered by a protective order. And there too, you had a situation where in civil litigation involving a common plaintiff, common parties, and identical issues with respect to enforcement of the subpoena, and no dispute that the subpoena would be enforceable if served directly on the resisting party, then the court reached the conclusion that as a practical matter, there was less reason to worry about the restrictions of the protective order. And there too, the court found that here in fact been a showing of compelling need.

So again, to answer the question directly, I think that is precisely -- that is one of the very important issues in this case. It is a problem that cannot be resolved here. And we simply won't know the answer if the SEC can get these documents from the trustee rather than asking for them from FAM, in which case FAM could, if appropriate, go to the issuing court and make a motion to quash.

THE COURT: Did you have any discussion with anyone from the SEC about whether the SEC would agree that if the SEC got the documents from the Chapter 11 trustee, it would agree that you'd have the standing to assert any privilege if you and

the SEC couldn't agree on the SEC giving the documents back?

MR. TREMONTE: We did -- I suppose, indirectly, yes. I mean, the staff informed me that an arrangement had been in principle agreed to between the staff and the trustee that they would agree to a clawback provision which --

THE COURT: Forgive me. The "they" being?

MR. TREMONTE: I apologize, Your Honor. I was informed that the staff of the Securities and Exchange Commission and the lawyers for the trustee has agreed to a clawback provision. But as I said earlier, it makes no sense to me, because it puts the trustee in the position of having to enforce another party's privilege, namely Fletcher Asset Management's privilege. And the trustee doesn't represent Fletcher Asset Management. So --

THE COURT: So you're saying the critical deficiency is that you need to have the standing to be heard either before me or the subpoena-issuing court to enforce the clawback personally?

MR. TREMONTE: Your Honor, that is one of multiple critical deficiencies. The other important, sort of, piece of the history of discovery here, has to do with the manner in which discovery has been conducted in the Chapter 11 proceeding. And there, Your Honor, a little bit of -- two minutes of history is in order.

It's not disputed that the trustee came into

possession of FAM's e-mails under unusual circumstances in this case. The debtor, Fletcher International Limited Bermuda, is an affiliate of Fletcher Asset Management, my client. Prior to the appointment of the trustee in this case, debtor's former counsel, Young Conaway, made a copy of the e-mail server, which is really the repository of all the documents that are at issue on this motion. And that e-mail server, which contained all of my client's e-mails, among others, was provided by Young Conaway directly to the trustee.

The parties recognize that under these unusual circum -- well, under any circumstances, it would be improper for the trustee to have unfettered access to Fletcher Asset Management's e-mails, the trustee representing a different party. So accordingly, the parties began discussing practical and efficient alternatives to a traditional full-dress privilege review.

What apparently they didn't want was they didn't want to have to give the server back to Fletcher Asset Management and have them do a soup to nuts document-by-document review. And so in various conversations and e-mail exchanges between, on the one hand, the trustee's lawyers, and on the other hand, predecessor counsel for Fletcher Asset Management, the parties discussed arrangements which were never reduced to a single definitive writing, which entailed the trustee running searches through the e-mails for the names of certain attorneys and law

firms and then providing the results of those searches to Fletcher Asset Management for further review.

So it's a two-step. First the trustee runs lawyers' names through the database, and then any document, any e-mail that has a lawyer's name on it, goes over the wall to Fletcher Asset Management. Fletcher Asset Management reviews it for privilege and produces a privilege log. According to these arrangements, FAM's attorneys reviewed tens of thousands of documents that came back over the wall.

Now, although such arrangements may have been useful under the circumstances as an ad hoc alternative to a full-blown privilege review, inherent shortcomings in this method are obvious. Such arrangements are necessarily under-inclusive, because they provide no mechanism to capture privileged communications that recount attorney advice if the attorney himself or herself is not a party to the communication. And it's settled law that you don't have to have a party on a communication within a corporate entity for the communication to be privileged.

So whatever FAM's willing -- whatever the willingness of my client, Fletcher Asset Management, to proceed under this provisional arrangement for the limited purpose of facilitating the trustee's work, Fletcher Asset Management is not willing to share its materials with outside parties absent a comprehensive privilege review, and it should not be forced to do so.

And this is especially true -- back to the case law -- where the party seeking disclosure is the government and not a private party. Whatever the shortcomings of the conduct of discovery, FAM has at all times acted in reliance on the clear terms of the protective order. FAM has relied on it to prevent: a) the disclosure of privileged communications to third parties, as well as b) any claim that FAM inadvertently waived it privilege.

And to claim otherwise, as the SEC does, in our view, really is to ignore the reality of what happened on the ground in this case, which as I said, was highly unusual.

THE COURT: All right. Thank you.

MR. TREMONTE: Thank you, Your Honor.

THE COURT: Mr. Jacobson.

MR. JACOBSON: Your Honor, Neal Jacobson on behalf of the Securities and Exchange Commission. The first thing I'd like to say is we obviously would agree with Fletcher Asset Management that if any documents produced to us, in fact, turn out to be privileged we would return them to Fletcher Asset Management.

THE COURT: Pause right there please, Mr. Jacobson. So if I were to otherwise agree with you, and if I were to say that you get the documents, but if I were to also say, in baby talk, that Fletcher Asset Management has the right to invoke the clawback in its own name, has all of the standing necessary

to do so, and has full rights vis-a-vis the protection of its privilege, I could expect that my order and condition would be complied with?

MR. JACOBSON: Absolutely, Your Honor.

THE COURT: Okay.

MR. JACOBSON: We have no intention to argue that privilege was waived when the documents were given to the trustee.

THE COURT: Well, I hear you. But I was thinking mainly of the standing issue. Standing is often a big deal to Article 3 courts, and I want to have the comfort, if I otherwise agree with you, that I won't hear contentions that Fletcher Asset Management or anybody associated with Fletcher Asset Management's privilege lacks standing to assert any rights.

MR. JACOBSON: We would agree to any order that provided for that protection.

THE COURT: Continue, then, please.

MR. JACOBSON: With respect to Fletcher Asset Management's argument that the SEC had not subpoenaed the documents from them directly, we have a lawful investigation ongoing, and we typically subpoena documents from many sources. As set forth in the declaration from the attorney involved in Washington, we only found out about these documents relatively recently, because we knew that the trustee already had them and

he had already gone through a privilege review of some type. I can't speak to exactly what happened. The trustee's counsel may be able to speak to the exact agreements and the privilege review that was done.

So in our view, there is nothing preventing the SEC from simply subpoenaing the trustee for the same documents.

THE COURT: Um-hum. Come a little closer to the microphone, if you would, please.

MR. JACOBSON: So in the SEC's view there is nothing prohibiting us, and there was no reason not to subpoena the documents at the source where they were located, which was with the trustee, because that's where we found out that the documents actually existed. We were not aware of these documents prior to that.

In terms of going directly to Fletcher Asset Management for the documents, I'm really not sure how -- assuming that the privilege is protected, I'm really not sure what argument Fletcher would have -- Fletcher Asset Management would have to withhold production of documents from the Securities and Exchange Commission. In fact, we don't dispute that in the past, Fletcher Asset Management, in fact, did produce documents pursuant to a subpoena, so I'm really not sure why this subpoena would be special and they'd be able to argue that they don't have to -- they do not have to produce corporate e-mails to the SEC, pursuant to a subpoena that was

issued in a lawful investigation.

In any event, so therefore, I'm not sure why it's relevant what the history -- the history, how that's relevant to the determination of whether the SEC can get these documents from the trustee now. I just don't understand. And we don't believe, as we set forth in the papers -- I don't want to repeat what we said in the papers -- but we don't believe that the confidentiality agreement, in fact, gives Fletcher Asset Management blanket ability to withhold documents just by noting that they're confidential. We do believe that the provision in paragraph 10 gives them a lot of protection in that it allows them to come to court and explain why the documents should not be produced, why they are confidential and should not be produced to the SEC.

THE COURT: Fair enough. Anything further?

MR. JACOBSON: No, Your Honor.

THE COURT: Thank you.

Mr. Hornung, do you want to weigh in on this?

MR. TREMONTE: Your Honor --

THE COURT: Verbally, I mean.

MR. TREMONTE: -- may I be heard before Mr. Hornung addresses the Court?

THE COURT: On his standing to be heard?

MR. TREMONTE: On a related issue to the standing to be heard.

Mr. Hornung submitted an affidavit concerning the factual history and events that took place in the past, and the conduct of discovery in recent months. If Mr. Hornung is going to make representations to the Court concerning any historical facts related to the production, I would respectfully request an opportunity to examine.

THE COURT: To examine what?

MR. TREMONTE: To examine Mr. Hornung on his statements to the Court under oath.

THE COURT: No. You had the ability, if you wanted to, to submit a reply, a reply just as he did. And under my case management order, which couldn't be clearer, every matter is a nonevidentiary hearing on its first day, unless and until matters are put into dispute or the parties tell the Court in advance that it will be an evidentiary hearing.

Now, I'll take your representations as a lawyer, just like I'll take his, if you want to respond verbally, although even that is an abuse, because you failed to comply with the case management order. And the bankruptcy system, even before the days of sequestration, Mr. Tremonte, could not function if people demanded the right to have evidentiary hearings whenever they wanted to. So please sit down.

Mr. Hornung, I'll hear from you.

MR. HORNUNG: Good morning, Your Honor. Just a few things. Mainly the trustee takes no position on whether or not

these documents should be produced or not. We stand ready, willing, and able to comply with however Your Honor decides this should be disposed of.

I did want to clarify or at least respond to a few things that Mr. Tremonte said in his opening remarks. The first is with his characterization of our agreement with respect to whether or not the documents were designated as confidential. The trustee agreed that Mr. Tremonte and Fletcher Asset Management could, in fact, mark the documents as confidential. However, we did not agree that they were, in fact, confidential within the meaning of a protective order, and expected and reserved our rights to use Paragraph 8, consistent with the order, to raise an issue and bring it to the Court after first conferring with Fletcher Asset Management about whether or not those documents were confidential.

Second, I just wanted to clarify briefly about Mr. Tremonte's description of the trustee's review process of the e-mails. The review process was a little bit more fulsome than Mr. Tremonte described. Each and every document was, in fact, reviewed for privilege, regardless of whether or not it had an attorney's name on it or whether it was sent to an attorney. The trustee employed a team of contract attorneys to do that. And I personally have not reviewed all 400,000 documents, but I can tell you that procedures were put in place and we hope and expect that those were followed, and that very few documents

slipped through the crack.

Finally, I just wanted to clarify with respect to the description of the hard drive that contained the e-mails. My understanding is that there was nine or ten custodians that were on the Fletcher Asset Management hard drive that was turned over to the trustee. It was not the entire e-mail server of Fletcher Asset Management. Those e-mails were collected by the debtor's previous counsel at Young Conaway just the week following the debtor's petition.

And with that, I stand ready to answer any questions that Your Honor may have. After we conclude oral argument, I did want to raise just two brief matters with the Court, but we can table those until later, if that's okay with Your Honor.

THE COURT: It is not just okay, but necessary. All right.

Mr. Tremonte, I'll take reply, limited of course to new matter that was set forth by either Mr. Jacobson or Mr. Hornung verbally.

MR. TREMONTE: Your Honor --

THE COURT: Come to the main lectern, if you would, please.

MR. TREMONTE: Thank you, Your Honor. And my apologies to the Court. It was not my intention to run afoul of the Court's case management order. I did not anticipate that Mr. Hornung would be heard on this motion.

THE COURT: Pause, please. When he filed a submission himself?

MR. TREMONTE: Your Honor, again, with apologies, I did not anticipate that Mr. Hornung, in his capacity on this motion as a fact witness, would stand at the lectern and make argument with respect to the pending motion. It's my mistake, Your Honor. Perhaps I should have anticipated that. But I did not mean to run afoul of the Court's case management order which we did consult.

I'd like to make the point that as far as we are aware, there is not a case in the Second Circuit in which the government has sought access to documents covered by precisely this kind of protective order, where such access has been granted. And the rationale set forth in all the decisions where it's the government -- and that includes both criminal and civil agencies, it's both the DOJ and the SEC, it's the CFTC in one of the cases -- the courts' rationale is clear. The awesome investigative powers of the government make it impossible for it, under all the circumstances that have been presented to the Court, to show compelling need.

And this case is no different in that the SEC indisputably, as counsel for the Commission has acknowledged, can subpoena FAM directly.

And finally, Your Honor, I would simply note that to the extent that the Court is inclined to grant the motion -- to

deny the motion and to grant access to the discovery materials by the SEC, which of course we emphatically believe is not the appropriate result, we would respectfully request that Your Honor's order include an explicit prohibition that prohibits the Commission from sharing documents with any other party, including other government agencies. Thank you, Your Honor.

THE COURT: Mr. Jacobson?

MR. JACOBSON: Thank you, Your Honor.

THE COURT: Limited to anything new that we just heard from Mr. Tremonte.

MR. JACOBSON: Thank you, Your Honor. Just with respect to the Martindell line of cases, our reading of those cases, the protective orders in place were specifically in place in order to prevent the government from obtaining the discovery, and the discovery was mostly documents created in reliance upon the specific protective order, testimony given in reliance on the protective order, and waiver of Fifth Amendment rights to reliance on the protective order. And the parties specifically contemplated that the government should not receive those documents.

Here, the protective order was entered at the request of the trustee for his benefit so he wouldn't have to negotiate separate orders with various parties. There is nothing in this order that indicates at all that the government would not be entitled to any of these documents pursuant to the normal

subpoena process.

With respect to the sharing of documents, I will say the SEC does have, under the Code of Federal Regulations, there's certain entities which the SEC is permitted to share documents with. However, they -- the sharing is only pursuant to the terms of whatever the agreement was, pursuant to which the SEC received those documents. So in the event that the documents would be shared, pursuant to federal law, they would be subject to the same restrictions that the SEC received.

THE COURT: All right. Gentlemen, I'm going to take recess, after which I'll rule. I want you back here by 10:55. I can't guarantee you that I'll be ready by that time. I'll see you then.

Mr. Hornung, I'll deal with your administrative matters or other matters after I've ruled. We're in recess.

IN UNISON: Thank you, Your Honor.

(Recess from 10:42 a.m. until 11:59 a.m.)

THE COURT: I apologize for keeping you all waiting.

Ladies and gentlemen, in this contested matter in the Chapter 11 case of debtor Fletcher International, Ltd., which I'll refer to as "the debtor", Fletcher Asset Management, an affiliate of the debtor, moves for an order enjoining the Chapter 11 trustee, whom I'll refer to as "the trustee", from producing documents to the Securities and Exchange Commission in alleged violation of the uniform protective order, which

I'll refer to as "the protective order", entered by this Court in debtor's Chapter 11 case.

Fletcher's motion is opposed by the SEC principally on the basis that Fletcher hasn't shown good cause for an additional protective order protecting these documents or modifying the earlier order, especially when the SEC could obtain these documents directly from Fletcher Asset Management, albeit only after additional delay and expense.

I agree with the SEC. The protective order in question, which was a blanket order entered without judicial review of any of the documents sought to be protected, granted Fletcher Asset Management interim protection to enable Fletcher Asset Management to show, if it could, a basis for protecting the confidentiality that was claimed. But it was a procedural order facilitating production and envisioning second-stage inquiry to determine whether continuing protection was appropriate.

It could not justify reasonable reliance. And in particular, it did not provide broad-based dispensation to protect thousands of documents from disclosure based on ipse dixit claims of confidentiality by Fletcher Asset Management, especially when Fletcher Asset Management chose to designate as confidential every single document it produced.

Fletcher's motion is denied, albeit on conditions that are necessary to protect its legitimate rights. The facts

underlying my decision, my conclusions of law, and the bases for the exercise of my discretion follow.

Turning first to the underlying facts. As the differences between the parties are not due to those underlying facts, but how I should interpret the protective order I entered in light of those facts, an evidentiary hearing was unnecessary. Thus I won't make extensive findings of fact, except to note particular facts that inform my decision.

Under my case management order, facts not disputed in motions and motion-related papers are taken as truth. See case management order, paragraph 2. The facts come from matters as to which I can take judicial notice under Federal Rule of Evidence 201, from undisputed assertions of fact in the motion papers, and from undisputed evidence in declarations by Jennifer Leete of the SEC, and Stephan Hornung, one of the counsel for the trustee.

As facts, I find that the protective order was so ordered by me and entered on this Court's docket without a hearing, November 9, 2012. The broad purpose of the protective order was to govern the disclosure, discovery, production, and use of documents and other information provided to the trustee or any other party granted access to discovery material, subject to the protective order. See protective order, paragraphs 1 and 2.

In July 2012, certain Fletcher e-mail accounts held by

employees and consultants were copied. The trustee, Fletcher Asset Management, and Alfonse Fletcher, an executive associated with Fletcher Asset Management, agreed on a review protocol to glean potentially relevant documents from the copied e-mail accounts, and to screen those documents for privilege. Tens of thousands of e-mails produced to the trustee have undergone this process.

Later, on or about June 19, 2013, in connection with an investigation of Fletcher Asset Management, the SEC subpoenaed the trustee. The subpoena ultimately sought those corporate e-mails that Fletcher Asset Management and its affiliates produced to the trustee, and that already had been reviewed for privilege. The SEC has not requested nor has it received the presently sought documents from Fletcher Asset Management directly.

Turning now to my conclusions of law and the bases for the exercise of my discretion. I've considered Fletcher Asset Management's argument that the Second Circuit's 1979 decision in Martindell v. International Telephone and Telegraph Corporation, 594 F.2d 291 (2d Cir. 1979), speaking through Judge Mansfield, which requires the party seeking to modify a protective order to show either: 1) improvidence in the granting of the protective order, or 2) some extraordinary circumstance or compelling need, applies to the present matter.

Martindell, which of course is binding on me, does not

prohibit production in a situation like the one we have here. First, the protective order in Martindell was a substantive order that specifically protected the transcripts of twelve depositions of party and non-party witnesses from being disclosed or used outside of the civil litigation in which the protective order had been issued. Here, as I noted earlier, the protective order contemplated further proceedings which would determine the extent to which the documents would remain subject to confidentiality and does not necessarily warrant the same protection as the substantive order in Martindell.

Importantly, Martindell was not the last word on this issue, either from the Second Circuit itself or from lower courts. In 2001, the Second Circuit in SEC v. TheStreet.com, 273 F.3d 222, addressed the situation again. While with full consideration and analysis of Martindell, the circuit, then speaking through Judge Cabranes, stated that "some protective orders may not merit a strong presumption against modification. For instance, protective orders that are on their face temporary or limited may not justify reliance by the parties. Indeed, in such circumstances reliance may be unreasonable." 273 F.3d at pages 230-231.

It continued, "Where a litigant or deponent could not reasonably have relied on the continuation of a protective orderm a court may properly permit modification of the order. In such a case, whether to lift or modify a protective order is

a decision committed to the sound discretion of the trial court." That's 273 F.3d at page 231, quotation marks and bracketing deleted.

Later case law down in the trenches in the trial courts have fleshed out those considerations and articulated standards for judges like me to apply. One of the most important of those is Judge Underhill's decision in the Ethylene Propylene Diene Monomer Antitrust Litigation, more commonly referred to as the EPDM Antitrust Litigation.

While Judge Underhill expressly recognized that Martindell imposes a presumption on the continued protection of information produced under confidentiality stips and orders, when those orders, among other things, led to reasonable reliance, he continued that "application of the Martindell presumption against modification depends on the nature of the protective order and whether it invited reasonable reliance by a party or deponent." I'm reading from 255 FRD at page 318.

He continued that, "an examination of Second Circuit case law reveals the following factors as relevant when determining whether a party has reasonably relied on the protective order. 1) the scope of the protective order; 2) the language of the order itself; 3) the level of inquiry the court undertook before granting the order; and 4) the nature of reliance on the order."

He added that, "additional considerations that could

influence a court's decision to grant modification of the order would include the type of discovery materials the collateral litigant seeks, and the party's purpose in seeking a modification."

Judge Underhill added, understandably, that "given the wide variety of protective orders in operation, the more flexible approach to modification emphasized by TheStreet.com, is sensible.

Judge Underhill continued that, "When considering a motion to modify, it's relevant whether the order is a blanket protective order," and I add parenthetically that that's exactly what we have here, "covering all documents and testimony produced in a lawsuit, or whether it's specifically focused on protecting certain documents or certain deponents for a particular reason. A blanket protective order is more likely to be subject to modification than a more specific targeted order, because it's more difficult to show a party reasonably relied on a blanket order in producing documents or submitting to a deposition."

He observed that, "Although such blanket protective orders may be useful in expediting the flow of pre-trial discovery materials, they are by nature over-inclusive and are therefore particularly subject to later modification."

Before I continue with the case law, I should observe that that was exactly my understanding and intent when I so

ordered the stip. It was plainly useful in expediting the flow of discovery materials, but I well understood that when I gave one side the right to designate as confidential whatever it wanted without any judicial scrutiny at all, there was the risk, if not probability, that it would be over-inclusive, and the order expressly contemplated later modification.

Judge Underhill's decision in the EPDM litigation was followed, not surprisingly, in later authority, and in particular by Magistrate Judge Ellis in International Equity Investments, Inc. v. Opportunity Equity Partners, Ltd., 2010 WL 779314 (S.D.N.Y. March 2, 2010). He made a number of observations, one of which in particular is applicable here.

He said, "Where the parties have not given up any rights and, indeed, would have been compelled to produce the discovery materials even in the absence of a protective order the presumption against modification is not as strong." I'm reading from page 7 of his decision, which in turn cites EPDM at page 323.

As Judge Underhill did and as Judge Ellis did I look at the particular factors that were identified in EPDM and later in International Equity Investments.

First, as to scope, the protective order here was a blanket protective order under which the disclosing party had "free reign" to designate as "confidential" or "highly confidential" any and all proprietary and confidential

nonpublic information. Protective order paragraphs 1 and 5.

The free reign to which I made reference was taken from International Equity Investments at page 5. Here, as there, the producing party had free reign to designate as confidential any and all documents supplied on good-faith showing only. I have no reason to doubt good faith in having designated so many, and, indeed, all of the documents confidential, but it evidences the fact that that was the starting point and not the ending point of any determination as to the extent to which continued confidentiality would be warranted.

Unlike in Martindell the protective order here is "Broad and not focused on any narrow set of materials, and it allows unilateral designation by the [disclosing party] without court intervention." See International Equity Investments at page 5.

Of course, broad protective orders such as this have become common procedural tools "to keep discovery pursuits to a minimum and the proceeding moving." See EPDM at page 319.

I can reasonably infer that the protective order in this matter as originally stipulated to by the parties was entered with that goal in mind. Certainly, that was my understanding when I so ordered it. And I note, once again, that that was all I could do because I hadn't reviewed a single document as to which confidentiality was claimed.

Turning to the second of the EPDM and International Equity Investment factors, language of the order, itself, "Anticipates the potential for modification [and] contains specific procedures for disclosing confidential materials to nonparties," again making it unreasonable for Fletcher Asset Management to have relied on an assumption that it could never be modified.

Importantly, critically, the order expressly contemplated an opportunity for declassification, if you will -- I use classification in the military sense -- in further proceedings.

The third factor, the level of inquiry taken by the court in entering the protective order, also cuts against any conclusions that might otherwise be argued to be premised upon the Martindell Doctrine. "A protective order granted on the basis of a stipulation by the parties carries less weight than a protective order granted after a hearing to show good cause." International Equity Investments at page 6.

Here, the protective order was entered on an unopposed motion of the trustee and without a hearing. Fletcher Asset Management didn't have to show good cause for why all of the documents it produced to the trustee should be protected as "confidential." And as I've noted, I did not review any of the documents as to which confidentiality is claimed. Frankly, the notion that every one of the thousands of documents that were

designated as confidential would ultimately deserve to be kept that way is absurd.

Finally, turning to the fourth factor, the nature of Fletcher's reliance further cuts against granting a presumption against modification of the type noted in Martindell. In evaluating reliance, courts in this circuit analyze whether a party gave up rights to produce documents they would not otherwise have been compelled to produce. And where parties testify, notwithstanding an arguable Fifth Amendment privilege, that is of a reliance very different than of the character we have here.

If a party has given up substantive rights, much less Constitutional ones, it's more likely that the Martindell presumption will apply. And as you will recall, Martindell involved transcripts of testimony that could have been taken notwithstanding Fifth Amendment rights. Reading from pages 296 and 297 of Martindell the -- I note that the circuit placed emphasis on the fact that the deponents testified in reliance upon the Rule 26(c) protective order, absent which they may have refused to testify. Considerations of that type certainly got the attention of the Second Circuit, and they certainly have gotten mine.

Here, because both sides recognize that the SEC could directly compel Fletcher to disclose the documents, Fletcher did not relinquish, in any meaningful way, any rights in this

document production to the trustee. I cannot and do not make a finding here that it acted in justifiable reliance.

All four factors show that the protective order isn't entitled to the strong presumption against modification that was established in Martindell. So where does that take us? Fletcher Asset Management may still be entitled to protection, but it no longer has the benefit of a presumption, and, ultimately, the issue becomes one of the Court's discretion as Judge Ellis expressly noted.

So having found then that Martindell doesn't compel a particular conclusion, I now turn to whether Fletcher has met the burden imposed on it by paragraph 10 of the protective order. That paragraph provides in relevant part, "If a receiving party...is requested pursuant to, or becomes legally compelled by, applicable law, rule, regulation, regulatory authority, or legal process to make any disclosure that is otherwise prohibited or constrained by this protective order the receiving party...shall provide written notice of such...compel disclosure...to the disclosing party...so that the disclosing party may seek an appropriate protective order or otherwise -- or other appropriate relief." I'm omitting further matter in that paragraph.

I note, however, before continuing, that the portion that I read expressly contemplates further proceedings, and that the fact that matter was designated as protected in the

protective order was not the last word on it. It expressly contemplated an application for an appropriate protective order which, if the Court considering any such request was not sitting as a potted plant, would be decided in accordance with its discretion.

The parties agreed that paragraph 10 applies to the present dispute, and that paragraph 10 required the trustee to notify Fletcher of the SEC subpoena. And, of course, the trustee did so comply. Then Fletcher Asset Management had the right to seek an appropriate protective order or other appropriate relief, as Fletcher has done here. And now I'm determining what is appropriate relief.

But the language that I just quoted, or for that matter, the remainder of paragraph 10 doesn't mean that relief, especially appropriate relief, must be granted. It's a matter of judicial discretion. Here, Fletcher Asset Management failed to show good cause for enjoining the trustee from producing documents to the SEC. It doesn't amount to good cause to merely argue, 1) that the documents should be protected simply because they were claimed to be confidential, or 2) that the danger of inadvertent disclosure should altogether prevent production to the SEC.

As the SEC fairly observes, "Fletcher cannot and does not argue that the subpoena was issued for an improper purpose, that it seeks irrelevant information, or that it's overly

burdensome," quoting from the SEC's opposition on page 4.

The second concern, inadvertent disclosure, is a more legitimate one, but it was already addressed by the clawback entered into by the trustee and the SEC on August 19th, 2013, and it can also be addressed that by conditions, that I can and will impose on the SEC to ensure that the clawback is as meaningful for Fletcher Asset Management, as it otherwise was originally drafted to be.

It's well established, of course, that judges like me who have entered orders, have the power to construe them. Putting it differently, judges have the power to construe their own orders. See, for example, In re Applied Theory Corp., 2008 WL 1869770 at page 3, citing Truskoski v. ESPN, Inc., 60 F.3d 74, 77 (2d Cir. 1995). ("It is peculiarly within the province of the district court to determine the meaning of its own order...and the court's interpretation of its order will not be disturbed absent a clear abuse of discretion...." See also Global Crossing Estate Representative v. Alta Partners Holdings, LDC, (In re Global Crossing, Ltd.), 2008 Bankr. LEXIS 988 at page 86, and note 113, 2008 WL 934012 at page 22 and note 113, a decision that I personally issued back in 2008 noting and applying that principle.

So I enjoy the benefit of knowing my intent in ordering as I did. When I so ordered the stip without having first reviewed the documents that would only later be produced

I wasn't determining that any documents warranted protection. As Judge Underhill observed, I was only managing the litigation and moving the ball going forward.

So I am declining to modify the stipulation -- or, excuse me, I am modifying the stipulation to allow delivery of the documents to the SEC subject to other limitations in the stip, and, in particular, subject to some conditions that I add as necessary protection in the balancing act between need and protection, which is otherwise warranted under cases like EPDM and International Equity Investments.

As conditions to the ability of the SEC to receive the documents and the resulting modification of the order to make that clear, my new order, which will be entered pursuant to this ruling, is to provide in substance that the clawback provisions will apply to the SEC and to anyone who gets the documents from the SEC to the same extent as they did with respect to the production to the trustee.

The order is also to expressly provide that Fletcher Asset Management has standing to be heard as a jurisprudential matter to enforce the confidentiality provisions and the clawback, and has the substantive right to enforce the clawback in the event there has been or turns out to be any inadvertent production, notwithstanding an otherwise applicable privilege.

I have considered the oral request made at the end for limiting production to the SEC. That request is granted in

part and denied in part. I will permit disclosure to be made not just to the SEC but to any other agency or entity of the United States. I am not, however, at least at this time, authorizing delivery of the documents to any private litigant.

My discretion in that regard is informed by a couple of things.

First, as a general matter, at least on facts now known to me, the need for providing documents to private litigants is not as great as it is to allowing access to governmental agencies in doing their job.

Also, of course, I have confidence that, as I've ordered, that those other governmental agencies would be subject to the same clawback provisions as the SEC would be, I need have no concerns in that regard. But there is also a lesser need and a propriety, at least seemingly, on the part of private litigants.

Many of the causes of action that private litigants bring, as we bankruptcy judges have come to learn, involve causes of action that they don't own; rather the causes of action that so many litigants bring actually belong to the estate, and are owned, if you will, by the Chapter 11 trustee, itself. It is possible that something that one of them might sue upon would actually be its own property and not belong to the Chapter 11 estate, but before that is assumed to be true it warrants a judicial stop, look and listen to determine that.

So I'm going to order that at this point the SEC can share anything it receives only with other governmental agencies, and may not share it with private litigants, though without prejudice to any future application to authorize a different disclosure. I'm not at all sure that I would authorize a greater disclosure to private litigants, but I'll keep an open mind on that going forward.

So the motion is determined in accordance with the decision I just dictated. The SEC is to settle an order in accordance with the foregoing, being sure to include the conditions along with the bottom line, at its earliest reasonable convenience, which can, to the extent applicable, include any limitations on the SEC's resources by reason of either sequestration or the government shutdown.

I would encourage, but not require, the SEC to run its draft form of order past counsel for Fletcher Asset Management, to minimize the likelihood of any dispute. But if after having tried and failed to do that, or if the SEC really thinks it needs to without engaging in that process, the SEC wants to settle an order, it has my permission to do so.

All right, folks, not by way of reargument, are there any open issues?

Hearing none, we're adjourned.

Mr. Tremonte, were you rising, I'm not meaning to cut you off?

MR. TREMONTE: I was not, Your Honor, I was conferring with my colleague. Thank you.

THE COURT: Okay.

MR. HORNUNG: Your Honor, just a few administrative matters --

THE COURT: Oh, yes, you had that. Come on up, please.

MR. HORNUNG: Thank you, Your Honor.

Your Honor, the first matter that we wanted to address was, as Your Honor is aware, we have an interim fee application hearing scheduled for next Wednesday at 9:45. In light of the government shutdown and with the U.S. Trustee's Office being closed, we think it might be appropriate to adjourn that hearing one or two weeks into the future.

THE COURT: I think that makes sense. If you had already gotten a nonobjection from the U.S. Trustee Program I would waive the hearing, but if they haven't had a chance to weigh in on it yet, I think we need to do that.

MR. HORNUNG: Yeah, Your Honor, we spoke with the trustee's office I guess --

THE COURT: The U.S. Trustee's Office.

MR. HORNUNG: Excuse me, the U.S. Trustee's Office on Tuesday evening, indicated they did not expect to object but had not finally reviewed all the pending applications.

THE COURT: Then your game plan makes sense.

As part of your dialogue, though, because I'm confident you're going to talk to them, given the same demands on them that I mentioned in a different context a minute ago, ask them if they want to appear personally, if they don't object, and if they don't I'll waive the hearing.

MR. HORNUNG: Okay, very good. Thank you, Your Honor.

And the second matter I wanted to bring up, just wanted to put on Your Honor's radar that we are in talks with Fletcher Asset Management about some discovery disputes. We do hope to resolve them this week. In the event that we do not, we would be seeking Court intervention. And I just wanted to let you know that you might be seeing something from us in the near future.

THE COURT: Well, please do. Of course, under the case management order they're not done on papers they're done by conference call, but you don't need me to tell you how burdensome these discovery disputes are.

MR. HORNUNG: No, I understand, Your Honor. And we hope to avoid bringing it to your attention.

THE COURT: Okay.

MR. HORNUNG: Thank you, that's all from us.

THE COURT: Okay. Then we're adjourned.

(Whereupon these proceedings were concluded at 12:02 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

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PENINA WOLICKI

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Date: October 3, 2013